Supreme Court, U. S.
FILED
MAY 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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October Term, 1975

No. _____

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Ohio, entered February 5, 1976.

OPINIONS BELOW

The Decision and Judgment Entry of the Court of Common Pleas of Warren County, Ohio, granting the Motion for Summary Judgment on behalf of the county officials and the Motion to Dismiss on behalf of the State officials, dated April 22, 1974, is printed in Appendix I hereto. The Judgment Entry reflecting the verdict of the jury in favor

of Petitioner Janene Riley, under Docket No. 31566 and 34679, as consolidated, in the Court of Common Pleas of Warren County, Ohio, in the sum of Two Million Dollars, dated May 13, 1974, is printed in Appendix G hereto. The Judgment Entry of the Court of Appeals for the First Appellate District of Ohio, under Docket No. CA-31, affirming the judgment of the Court of Common Pleas of Warren County, Ohio, dated September 25, 1975, and the Opinion of the Court of Appeals for the First Appellant District of Ohio, per Buzzard, J., are printed in Appendices D and C, respectively, attached hereto. The Entry of the Supreme Court of Ohio, dated February 5, 1976, dismissing for want of a constitutional question the appeal from the decision of the Court of Appeals for the First Appellate District of Ohio, is printed in Appendix A attached to this petition. The Notice of Appeal to the Supreme Court of the United States was filed in The Supreme Court of Ohio on May 3, 1976.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

QUESTION PRESENTED FOR REVIEW

May a state court apply the doctrine of sovereign immunity in dismissing the State of Ohio and its employees, Directors of the Department of Rehabilitation and Correction and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren County, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School, without thereby denying the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

On February 22, 1968, Petitioner, Janene Riley, sustained injuries including the amputation of both of her legs as she was standing off the paved portion of State Highway 48 in Warren County, Ohio. She was struck by a school bus being operated by Respondent, Betty Stephens, the ownership, operation and maintenance of the bus and the payment of Stephens being under the direction, supervision and control of the Board of County Commissioners of Warren County, Ohio, the members of the Warren County Board of Mental Retardation, Green Knoll School and the auspices of the Department of Rehabilitation and Correction and Department of Mental Health and Mental Retardation of the State of Ohio.

The governmentally related defendants responded to the Petitioners' pleadings by filing a Motion for Summary

Judgment on behalf of the County officials and a Motion to Dismiss on behalf of the State officials. These motions were grounded on the doctrine of sovereign immunity and were granted, dismissing these respondents with prejudice.

Prior to the accident Stephens was operating the bus in a southerly direction and she was confronted by a fuel oil delivery truck which stopped suddenly in front of her causing her to take evasive action, and in so doing struck the minor petitioner. The oil truck was owned and operated by John C. Daunt who was found, by the verdict of the jury, to have been the agent and employee of Respondent, Loveland Oil Company, Inc., for whose negligence a verdict was rendered against it.

Trial of the action on the Third Amended Complaint was heard in May, 1974, resulting in a verdict in favor of the minor petitioner and her parents on their derivative claims against Respondents, Betty Stephens and Loveland Oil Company, Inc. Following disposition of the post trial motions of Loveland Oil Company, Inc., notice of appeal was timely filed and petitioners brought two Assignments of Error to the Court of Appeals for the First Appellate District of Ohio, including the question presented for review herein. The Court of Appeals for the First Appellate District of Ohio found that the petitioners were not denied their Fourteenth Amendment rights when their complaint was dismissed as against the County and its agencies. The same question presented herein for review by this Court was also presented to the Supreme Court of Ohio. That Court, without an opinion, dismissed the petitioners' appeal for want of a constitutional question.

As a prelude to argument on the question presented for review herein, it should be noted that the appearance in the trial court of the state and county employees was pursuant to a Motion under Rule 12 (B), Ohio Rules of Civil Pro-

cedure, which the Trial Court granted. As a consequence there was no opportunity to present evidence or other information except the legal authorities submitted by those respondents and adopted by that Court and the Court of Appeals for the First Appellate District of Ohio, and affirmed by the Supreme Court of Ohio, in their decisions.

THE REASONS FOR GRANTING THE WRIT

The act of the Supreme Court of Ohio dismissing the appeal from the affirmance by the Court of Appeals for the First Appellate District of Ohio of the dismissal by the trial court of the complaint as to the state and county officials:

1. Is in conflict with the recent decision of this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232, as well as the applicable law of the State of Ohio.

2. Effectively deprived the petitioners of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

In the course of its opinion affirming the dismissal of the state and county respondents on the ground of sovereign immunity, the Court of Appeals for the First Appellate District of Ohio states, Appendix C, page 8a, that the case at bar is distinguishable from the decision of this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232. There is no such distinction, however. *Scheuer* v. *Rhodes* was decided less than one week prior to the trial court's decision in this case dismissing the named state and county officials. In *Scheuer*, the district court had dismissed the complaints for lack of

jurisdiction prior to the filing of any answer on the basis that the Eleventh Amendment to the Constitution of the United States was an absolute bar to prosecution of an action against a state official. Procedurally, at the appellate level, the *Scheuer* case was in exactly the same posture as this case before the Court of Appeals and Ohio Supreme Court, there being no answer filed by defendants and no evidence produced. The Supreme Court in *Scheuer,* after stating that the trial court had acted prematurely in dismissing the action stated in its second syllabus:

> "2. The immunity of officers of the executive branch of the state government for their acts is not absolute but qualified in a varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken."
>
> 416 U.S. 232-33.

Concerning itself with a claim of damages against a person holding public office the *Scheuer* Court said:

> ". . . Damages against individual defendants are a permissable remedy in some circumstances not withstanding the fact that they hold public office. *Myers* v. *Anderson,* 238 U.S. 368. See generally *Monroe* v. *Pope,* 365 U.S. 167; *Moor* v. *County of Alameda,* 411 U.S. 693. In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."
>
> 416 U.S. at 237-38.

The United States Supreme Court in *Scheuer* remanded the case to the trial court to permit plaintiffs therein to prove their claim of liability against the individual state officials. It is further within the constitutional power of

the legislature to relieve a public officer, and its sureties, from liability for a loss of funds by general tax after such liability has been incurred, or, where payment of the loss has been made, the legislature is empowered to reimburse the officer or surety from funds raised by general taxation. *State* v. *Swing,* 54 Ohio App. 251, 6 N.E.2d 999. See also, *Bauer* v. *North Arkansas Highway Improvement District No. 1,* 168 Ark. 220, 270 S.W. 533; *Bolivar Township Board of Finance of Benton County* v. *Hawkins,* 207 Ind. 171, 191 N.E. 158.

If it is the law of the State of Ohio, as determined by the Supreme Court of the United States in *Scheuer,* that elected state officials are not absolutely immune from acts done under color of office, there is no basis to conclude that county officials do not fall into the same category. It should be even more apparent that the county officials are not immune since no immunity was provided to them by constitution in the first place. Referring to the previous authorities whereby the financial obligations of state officials can be honored by the legislature, a county may likewise be authorized to settle a claim resulting from negligence. Aside from any statutes concerning this matter, it has been held that where the state inflicts an injury upon an individual for the reparation of which no law exists, and the facts incident thereto are not in dispute, and the legislature finds that a moral obligation rests upon the state to compensate the injured party for damages sustained, the legislature has full authority to provide, by special enactment, for the appropriation of public money to meet such moral obligations; and where the county is the active agent in causing the injury, a special act may confer on the Board of County Commissioners the power to pay such compensation from the general funds of the county. Such special enactments of the legislature do not contravene any of the pro-

visions of either the state or federal constitution. *Spitzig* v. *State,* 119 Ohio St. 117, 162 N.E. 394.

At the trial level these petitioners were precluded entirely from presenting any evidence of negligence on the part of any of the governmentally related defendants. At the very least they are entitled to make that effort and it is submitted that, during the trial involving the remaining defendants there was strong evidence that the school bus driver not only was untrained in the operation of the large vehicle she was charged with operating, but had complained frequently to her superiors of her inability to handle and manage the vehicle.

As noted, the Court of Appeals stated in its opinion, Appendix C, page 8a, that *Scheuer* is distinguishable on the basis that it involved a claim based on a violation of federal civil rights while the present case is grounded on the Ohio law of negligence. Such an immaterial distinction should not, however, be permitted to obscure the fact that the issue before the Supreme Court in *Scheuer* was not dependent upon any specific type of damages claimed. Rather, the question was whether state officials were absolutely immune from acts done under color of office. The entire thrust of the decision is toward the concept of immunity, and this Court should not sanction the limiting interpretation placed upon *Scheuer* by the Court of Appeals for the First Appellate District of Ohio. From the language of the *Scheuer* opinion, the doctrine of governmental immunity, or whatever remains of it after this decision, does not preclude the petitioners from seeking to establish the merits of their claims against the state and county respondents. *Cf.* 416 U.S. at 238.

The concept of governmental immunity as relied upon by the trial court is exemplified by the syllabus of the Supreme Court of Ohio in *Schaffer* v. *Board of Trustees,*

171 Ohio St. 228, in which it is stated that, without statutory authorization, a county and its agencies are immune from suits for negligence. The proposition is submitted, however, that that doctrine is judicially created and, as such, can be abrogated by the judiciary. *Thacker* v. *Board of Trustees,* 35 Ohio St.2d 49, 298 N.E.2d 542 at 552 (Brown, J., dissenting). In this context two decisions of the Supreme Court of Ohio are important: *Avellone* v. *St. John's Hospital,* 165 Ohio St. 467, 135 N.E.2d 410; and *Sears* v. *City of Cincinnati,* 31 Ohio St. 2d 157, 285 N.E.2d 732.

In *Avellone,* the action was brought against a non-profit hospital by a patient for negligent treatment by the hospital. The defense relied upon the then-accepted doctrine of charitable immunity. The Court held the hospital liable under the doctrine of respondeat superior for the torts of its servant. While this holding is significant in that it set aside a well accepted and judicially approve doctrine, it is more important from the standpoint of this petition as illustrative of the commitment every court has to consider, reconsider and change, where necessary, outmoded or impertinent concepts. As the court stated in *Clouston* v. *Remlinger, Inc.,* 22 Ohio St.2d 65, 258 N.E.2d 230, in abolishing the inability of a wife to claim her loss of services and consortium;

> "This is an archaic conclusion without reason, based originally upon the ancient concept that a wife was not a person, but at most a superior servant to her husband . . . that ancient concept is no longer valid." 258 N.E.2d at 234.

The *Avellone* court noted that its original ruling of 1911 establishing full immunity from liability of a non-profit hospital had been based on long standing and historical precedent. Nevertheless, it addressed itself to the question

of whether under the conditions existing at the time of its decision, there were any valid reason to perpetuate the doctrine;

> "The determination of such question involved simply the balancing of two single 'rights.' On the one hand there is the well recognized right of non-profit hospitals to any benefit and assistance which society and the law can justly allow them – a right which they command by their very nature; and on the other hand we see the right of the individual injured by the negligence of a servant to look for recompense to the master of such servant under respondeat superior. Up to this point in the development of the law, this Court has apparently felt that the benefit to society as a whole, gained by granting immunity, weighed the former right in favor of the latter, and this was on the grounds that such masters were 'different from others,' and that immunizing them was 'a valuable aid in securing the ends of justice.' In our opinion this conclusion is no longer justified."
>
> 135 N.E.2d at 414.

It is beyond argument that the doctrine of charitable immunity was a judge-made rule and was never codified in Ohio. *Avellone*, therefore, states that a judge-made rule can be abrogated judicially in the context of tort immunity.

This same principle was extended to governmental tort immunity in *Sears, Supra*. This was an action for damages alleged to have been caused by the negligence of an employee of a municipal hospital. The Court held that the defense of governmental immunity was not available to the municipality which owned the hospital and that the city was liable under the doctrine of respondeat superior. The Court stated:

> "In so holding, the Court necessarily overrules *Hyde* v. *Lakewood*, . . . specifically, it rejects the statement

> in paragraph two of the Syllabus that a legislative act is required to remove the governmental immunity in question. Rather, this Court approves the reasoning of Gibson, J., in his concurring opinion in *Hack* v. *Salem*, 174 O.S. 383, 396, 189 N.E.2d 857, wherein he stated:
>
> > 'Admittedly the General Assembly has the authority to change or abolish the rule of immunity created by this Court for municipal corporations in regard to their so-called governmental functions, but that in no way precludes this court from changing its own rule . . .' "
>
> 31 Ohio St.2d at 161, 162, 285 N.E.2d at 735.

Sears stands for the proposition that governmental immunity, as a creation of the courts, can be waived, notwithstanding that the legislature may have enacted statutes codifying the doctrine.

Petitioners are not unmindful of the decision of *Krause* v. *State*, 31 Ohio St.2d 132, 285 N.E.2d 736, appeal dismissed, 409 U.S. 10052, Reh. Den. 410 U.S. 918. This case involved a claim for wrongful death arising from the Kent State University incident in May, 1970. There, the Supreme Court recognized that the amendment of Article I, Section 16 of the Ohio Constitution in 1912 abolished sovereign immunity in Ohio. It then stated, however, that any consent given by the state to be sued was not self-executing but required an act of the General Assembly before the state could be subject to tort suit in Ohio.

In its opinion, Appendix C, page 9a, the Court of Appeals for the First Appellate District stated that while *Krause* held that the immunity of the state did not violate the equal protection clause of the United States Constitution, nor was the appellant there denied due process of

law, nothing in that case changed the law with respect to the immunity of counties.

The law of Ohio is clear that although the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, it must be interpreted with reference to the facts and issues presented to the Court. *Williamson Heater Co.* v. *Radis,* 128 Ohio St. 124, 190 N.E. 403. This principle emphasizes the fact that the *Krause* case affects this litigation only as to the State of Ohio and not as to the county employees. In practically inviting a different result in a case of this court, the Supreme Court in *Krause* felt impelled to state in a footnote:

> "11. Because different considerations apply when the governmental body is a city, town, village, county, etc., the holding in the instant case may not be dispositive of the question of governmental immunity. Accordingly, we intimate no opinion on their amenability to suit."
>
> 285 N.E.2d at 745.

It is further submitted that the Supreme Court of Ohio, in dismissing the appeal from the decision of the Court of Appeals for the First Appellate of Ohio affirming the dismissal of the state and county employees not only runs counter to the decision of the Supreme Court of the United States in *Scheuer* v. *Rhodes, Supra,* but also amounts to a denial of the petitioners' constitutional rights guaranteed them by the Fourteenth Amendment to the United States Constitution.

The concept that a five year old child who loses both her legs is entitled to full compensation if she is struck by a privately owned bus but is entitled to no compensation when a similar bus is operated by the state or county is totally repugnant to the Fourteenth Amendment to the

Constitution of the United States and represents an arbitrary and unreasonable distinction incompatible with her rights as a citizen of the United States. In *Krause, Supra,* the Court of Appeals found a denial of equal protection by the application of governmental immunity related to the acts of the State of Ohio. The Supreme Court of Ohio, in overruling the Court of Appeals, specifically excepted counties and other governmental entities from its decision when it stated:

> "Assuming that such observation refers to municipalities, or other political subdivisions, there are sufficient substantive differences between them and the state to allow for such different results."
>
> 285 N.E.2d at 745.

To further emphasize the inequality which exists in this case, the Court must consider recent legislation of the Ohio General Assembly which removes any immunity of the state from liability and represents the consent of the state to be sued. Petitioner Janene Riley is eligible for relief under this enactment but only against the state. As a result, the legislature has specifically done what the Supreme Court requested it to do in the first syllabus of *Krause,* but has avoided doing what the Supreme Court in *Krause* said was probably not necessary because of the distinction between counties and other political entities and the state. This anomaly establishes the absurd result now that the state and private persons can be responsible for their torts but counties can not. Can it be validly stated that the class of persons injured by the negligence of private individuals or state employees is in fact different from the class of persons who are injured by the negligence of the county or county employees? To raise the question is to answer it. This Court, in *Yick Wo* v. *Hopkins,* 118 U.S. 356, speaking of discriminating laws, said:

> "Though while itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."
>
> 118 U.S. at 373-74.

The law as it now stands in the State of Ohio is not even "fair on its face" and is not "imparital in appearance." Under those circumstances it is the duty of the Court to strike down the law. *Baker* v. *Carr,* 369 U.S. 186.

The paramount theory behind the concept of governmental immunity has been that public funds ought not be diverted to individual claimants in the form of compensation for wrongs done them by governmental employees. This argument was disposed of in *Avellone, Supra,* touching on another area of immunity by recognizing the availability of liability insurance coverage. The General Assembly of the State of Ohio has similarly recognized the function of insurance. In a concurring opinion in *Hack* v. *Salem,* 174 Ohio St. 383, 189 N.E.2d 857, involving immunity of a municipality, Justice Gibson stated:

> "To raise the question of whether the municipality or the injured individual is better able to bear the cost is to answer it. The municipality, which is able to spread the cost of an injury among its tax paying residents, is in a much better position in the vast majority of cases, than the injured individual, who must bear such loss from his own resources."
> 189 N.E.2d at 868.

The opinion of Justice Traynor in *Muskopf* v. *Corning Hospital District,* 359 P.2d 457, offers the most systematic, effective and persuasive rebuttal of any justification for the

doctrine of governmental immunity. He concludes that such immunity is an anachronism without sound legal basis, and owes its existence solely to the forces of inertia. Obviously, as previously stated, the Supreme Court of the United States in *Scheuer,* the General Assembly of the State of Ohio, and at least Supreme Court Justices Corrigan, Brown, and Williams feel exactly the same way.

In its capacity as an obsolete holdover from earlier times, application of the doctrine of governmental immunity results in classifications that discriminate with respect to the rights of individuals to redress their wrongs. In depriving individuals of such fundamental rights without any substantial justification for its existence it creates an invidious discrimination prohibited by the 14th Amendment of the United States Constitution. cf *Shapiro* v. *Thompson,* 394 U.S. 618; *Reynolds* v. *Sims,* 377 U.S. 533.

Thus, the statement in the opinion of the Court of Appeals (App. C. page 8a), after its discussion of *Schaffer* v. *Board of Trustees, Supra,* that the rationale of that case "is that counties are local subdivision of the state and are likewise immune from suit" flies in the face of the earlier-quoted footnote 11 in the *Krause* opinion. The Supreme Court of Ohio indicated in that footnote that it was not expressing an opinion as to the amenability to suit of such entities. Petitioner submits that there are no substantive differences between a state and counties or other political subdivisions to allow for different results as to them.

Therefore, the action of the trial court in dismissing the appellants involved in this proposition of law, which action was affirmed by the Court of Appeals and the Supreme Court of Ohio has deprived Janene Riley of her rights to due process and equal protection of the law which she, as an innocent victim of activity totally unrelated to any essential government function, should not be required to suffer.

CONCLUSION

The instant case presents a clear example of the misapplication by the state courts, including the Supreme Court of Ohio, of the decision of this court in *Scheuer* v. *Rhodes*. In law and in fact this case dramatically emphasizes the injustice which can result from a blind adherence to legal precedents without recognition of underlying limitations and qualifications. This is not the unique case of government operating in a quasi-military situation as in *Krause* but involves routine daily activity for which the State of Ohio and its counties should be held just as accountable as any other citizen performing the identical activity. The *Scheuer* decision states that, in any event, a citizen has a right to proceed personally against state and county officials to establish their personal, as contrasted with imputable, negligence. Finally, there can be no justification for discriminating between the rights Janene Riley has when struck by a governmentally operated vehicle from those she would have if struck by any other commercial type vehicle, and the act of the Supreme Court of Ohio in dismissing the appeal from the affirmance of the trial court's dismissal of the state and county employees on the ground of sovereign immunity has effectively denied the petitioners their rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Leo J. Breslin.
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APPENDIX A

THE SUPREME COURT OF OHIO
1976 TERM
To wit: February 5, 1976

No. 75-1073

THE STATE OF OHIO,)
)
City of Columbus.)

JANENE RILEY ET AL.,
Appellants,

vs.

BETTY STEPHENS ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS FOR WARREN COUNTY

(Filed ————)

This cause, here on appeal as of right from the Court of Appeals for Warren County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certi-

fied to the Clerk of the Court of Appeals for Warren County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk

..... Deputy

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO
1976 TERM
To wit: February 5, 1976

No. 75-1073

THE STATE OF OHIO,)
)
City of Columbus.)

JANENE RILEY ET AL.,
Appellants,

vs.

BETTY STEPHENS ET AL.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR WARREN COUNTY TO CERTIFY ITS RECORD

(Filed ————)

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by Lindhorst & Dreidame

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
WARREN COUNTY, OHIO

No. CA 31

JANENE RILEY, by and through her mother and next friend DELORES RILEY, and
DELORES RILEY,
Plaintiffs-Appellants,

vs.

BETTY STEPHENS, et al,
Defendants-Appellees.

OPINION

(Filed September 15, 1975)

APPEAL FROM THE COURT OF COMMON PLEAS WARREN COUNTY, OHIO

Messrs. Lindhorst and Dreidame, Leo J. Breslin of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Plaintiffs-Appellants.

Messrs. Beiser, Greer and Landis, Leo J. Krebs of counsel, 8 North Main Street, Dayton, Ohio 45402, for Defendant-Appellee, Shell Oil Company.

Mr. Edward J. Utz, Fourth and Walnut Street, Cincinnati, Ohio 45202, for Defendants-Appellees, Warren County Employees,

Attorney General of State of Ohio, Columbus, Ohio 43215, for Defendants-Appellees, State Employees.

BUZZARD, J.

Plaintiff, a seven year old child, was grievously injured when a bus carrying Green Knoll Retarded Children, ran off the highway and struck her. The parents of plaintiff were apparently separated and each filed suit on behalf of their minor daughter. The actions were consolidated and judgments were entered on the verdicts against Stephens (driver of the bus) and the Loveland Oil Company. Plaintiff appeals and contends the court erred in dismissing defendants State of Ohio, Warren County Commissioners, Warren County Board of Mental Retardation, Green Knoll School and Shell Oil Company prior to trial.

It is contended by appellant that the driver of the oil truck was the servant of the Loveland Oil Company and of Shell Oil Company. Shell denies the agency, as does Loveland. The various state and county boards claim governmental immunity. The question then is whether the trial court was in error in dismissing these defendants prior to trial.

The appellant urges two assignments of error, as follows:

NO. 1. The trial court erred in granting the motion for summary judgment of the State of Ohio and its employees, directors of the Department of Rehabilitation and Correction and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren Coun-

ty, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School based upon the "concept of official governmental immunity" for the following reasons:

a. The doctrine of governmental immunity has been judicially created and, as such, it can be abrogated by the judiciary.

b. The doctrine of governmental immunity is no longer an automatic bar to claims for damages against State, County or Board of Education officials.

c. If the doctrine of governmental immunity is effective, the General Assembly of the State of Ohio has waived such doctrine as to the operation of schools and school bus systems by the State, County and Boards of Education by passage of legislation relating to the purchase and maintenance of liability insurance.

d. The application of the doctrine of sovereign immunity is a denial of the appellants' rights to equal protection and due process of law guaranteed by Article XIV, Section I, of the Constitution of the United States of America and Article I, Section 16 of the Constitution of the State of Ohio.

e. The application of the doctrine of governmental immunity in this case is against the public policy of the State of Ohio and deprives appellants of rights guaranteed to them by Am. Sub. H.B. No. 800 effective January 1, 1975.

NO. 2 The trial court erred in granting the motion for summary judgment of defendant, Shell Oil Company, for the reason that it deprived appellants of the entitlement to have the evidence before the court on said

motion construed most strongly in their favor pursuant to Rule 56 (C), C.R.P., and that, at that stage of the proceedings, reasonable minds could reasonably differ concerning the imputability of negligence by defendant, John Daunt and/or defendant, Loveland Oil, Inc. to Shell Oil Company.

It has long been the settled law of this state that the State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly, and this includes state boards and agencies.

Raudabaugh v. *State*, 96 Ohio St. 513

Palumbo v. *Industrial Commission*, 140 Ohio St. 54

State Ex Rel. Williams v. *Glander*, 148 Ohio St. 188

Wolf v. *Ohio State University Hospital*, 170 Ohio St. 49

Thacker v. *Board of Trustees of Ohio State University*, 35 Ohio St. 2d 49

Likewise, that Article I, Section 16 of the Ohio Constitution is not self executing and statutory consent is a prerequisite to such suit.

This doctrine of governmental immunity was challenged in the recent case of *Krause* v. *State*, 31 Ohio St. 2d 132. The Ohio Supreme Court was importuned to overrule such doctrine. The Court then proceeded to extensively reexamine the doctrine of sovereign immunity, particularly in the light of the history of Article I, Section 16, and reached the same conclusion as in the earlier cases cited herein. Appellant argues that the doctrine of govern-

mental immunity has been judicially created and, as such, it can be abrogated by the judiciary. It would be judicial insubordination for this Court to ignore these confirmed decisions of the Supreme Court. If this doctrine is to be abrogated judicially, it will have to be done by the Ohio Supreme Court.

Appellant says that the claim of sovereign immunity is no longer an automatic bar to claims against the State and cites the case of *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90 in support. The *Scheuer* case is distinguishable from the case at bar. It was based on the Federal Civil Rights law while the present case is grounded on the Ohio law of negligence. The Third Amended complaint makes no allegations invoking any federal rights which would justify the Federal Courts taking jurisdiction in spite of the Eleventh Amendment to the United States Constitution. We do not read the *Scheuer* case to mean that motions to dismiss for failure to state a claim, or motions for summary judgment, in State negligence actions, can no longer be sustained where appropriate. It is only to be read in the light of its own facts and where the action is grounded on a deprivation of federal statutory or constitutional rights.

Appellant claims that the State has waived its immunity in certain areas by legislation authorizing the purchase of liability insurance. Reference to the statutes cited reveals that the statutes deal with coverage of motor vehicles and school buses, and are for the protection of employees who might be primarily liable in tort, and of school children riding the buses. They do not appear to insure the political subdivision or the State. The driver of a State owned vehicle may be primarily liable in tort, even though his employer is protected by governmental immunity and the State does not waive its own immunity by protecting its employees, and school children.

Furthermore, there can be no waiver of immunity by implication. The consent to be sued, mentioned in Article I, Section 16 contemplates an express consent.

> See *Karr Construction Company* v. *Department of Natural Resources* (No. 9579 — Franklin County Court of Appeals, 1970).

It is significant to note that Syllabus three of *Krause* says that the consent to be sued must be statutory. It does not mention implied consent.

It is argued that the doctrine of sovereign immunity is a denial of appellants' rights to equal protection and due process of law guaranteed by Article 14, Section 1 of the United States Constitution. The Court held in *Krause* that the immunity of the State did not violate the equal protection clause of the United States Constitution. Neither was appellant denied due process of law. Her claim against the State was processed and dismissed because the General Assembly at that time had not consented by statute that the State could be sued. This decision of the State Court does not offend the Fourteenth Amendment with respect to due process. A litigant is not denied due process just because his claim is dismissed where it states no claim as a matter of law against the State.

But, appellant says the doctrine of sovereign immunity with reference to counties is not the same as against the State and points to note (11), page 146, of the *Krause* case. This note is in the nature of a caveat and does not change the law with respect to the immunity of counties.

> "In the absence of statutory authorization therefor, a County or its agencies are immune from suit for negligence."
>
> *Schaffer* v. *Board of Trustees of Franklin County Veterans Memorial,* 171 Ohio St. 228

The rationale is that counties are local sub-divisions of the State and are likewise immune from suit except where R.C. § 305.12 specifically imposes liability on the counties for failure to keep roads or bridges in repair. We are compelled to follow the *Schaffer* case.

We find appellant was not denied her Fourteenth Amendment rights when her complaint was dismissed as against the county and its agencies, which include the County Commissioners of Warren County and the Green Knoll School for Retarded Children and its Board of Trustees.

It is contended by appellant that the General Assembly has now changed the public policy in this State as regards immunity of the sovereign, by the passage of Am. Sub. H.B. No. 800, codified as Chapter 2743 of the Revised Code. The State may now be sued in the court of claims, effective January 1, 1975. R.C. § 2743.01 defines "State" and says that it does not include political subdivisions. "Political subdivisions" is defined to include counties. The appellant reasons that if the General Assembly has granted consent to sue the State, then this establishes the public policy of the State and therefore, counties should no longer be immune. We reject this reasoning. If the General Assembly had desired to broaden Chapter 2743 it could have very easily granted the power and right to sue counties. The public policy with respect to counties has not been changed by the passage of Chapter 2743 R.C.

Appellant complains that the trial court erred in granting summary judgment in favor of Shell Oil Company. John C. Daunt was the driver of an oil truck which delivered heating oil to various customers. Daunt's truck was involved in the accident along with the school bus. The question was whether Daunt was an employee of the Loveland Oil Company who supplied him with the oil or whether he was an independent contractor operating his own business. Loveland Oil Company had a contract with Shell Oil Company for the purchase of its oil and gas requirements and this contract was known as a Jobbers Sales Contract. There appeared on Daunt's truck a logo or decal of the Shell emblem and appellant argues this created an inference that the truck belonged to Shell and was being operated in its business at the time of the accident; that a prima facie case was made out which would support a finding of liability against Shell. This appears to be the present rule, although the inference or presumption is rebuttable.

McDougall v. *Glenn Cartage Company*, 169 Ohio St. 522

Cincinnati Transit, Inc. v. *Tapley, et al*, 28 Ohio App. 2d 26

The question of Shell's liability arose on motion for summary judgment. Civil Rule 56 (E) provides in part that:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In support of such motion, Shell submitted the affidavit of A. W. Kanacz, former area manager of Shell and also his answers to certain interrogatories. There were also considered the answers to interrogatories by John C. Daunt, the deposition of John C. Daunt and the deposition of

Edgar A. Runyon, Vice-president and General Manager of Loveland Oil Company, Incorporated. This supporting data shows that John C. Daunt owned the truck and he personally repaired and maintained it. He carried his own insurance on the truck. He was never employed by Loveland Oil, received no pay or fringe benefits from them and no W-2 wage form. He had no written contract with Loveland. He purchased his requirements from Loveland and then sold to his own customers, billing them with his own invoices and statements. Loveland had no control over his deliveries and didn't deal with his customers, except occasionally by mistake. He never had any agreement with Shell nor did he ever have contact with their representatives. He did not own any stock in Loveland nor were there any Loveland name or markings on his truck. Loveland did own three trucks of its own which were used to deliver gasoline to its retail customers. The only evidence connecting Daunt with Shell Oil was the emblem of Shell on Daunt's truck, placed there by Shell.

Is the presumption created by such name or emblem sufficient to withstand the force of the evidence against it? We do not think so. After considering all the evidence submitted on the hearing on motion for summary judgment, we think the trial court was correct in sustaining such motion. The evidence is so overwhelmingly in support of the motion that reasonable minds could not fairly conclude that the presumption should stand.

See *Brunny* v. *Prudential Ins. Co.*, 151 Ohio St. 86
Hurt v. *Charles J. Rogers Transportation Co.*,
164 Ohio St. 329, 21 O Jur 2d 108 § 102

With the removal of the presumption and giving appellant the benefit of every reasonable inference, there is no genuine issue as to any material fact involving Shell.

This Court has considered the cases of *Cincinnati Transit, Inc.* v. *Tapley*, 28 Ohio App. 2d 26 and *Clark* v. *Becker Discount Drug Co.*, C-74187, First District (2-18-75) cited in appellants' Reply Brief. In the *Tapley* case the defendant failed to offer any evidence to rebut the prima facie case against him. In the *Clark* case there was an apparent question of material fact whether plaintiff was aware of the hazard. These two cases thus differ from the case at bar.

Appellant also cites *Cleveland* v. *Keah*, 157 Ohio St. 331 which was not a summary judgment case. We do not interpret this case to mean that in any case where there is a presumption or prima facie case, that the case must automatically be submitted to a jury. If this were true, summary judgment would be inappropriate in all such cases. The true test is whether reasonable minds might differ as to the existence of a genuine issue as to a material fact.

This Court has been importuned by appellant to remove the "stigma" of the trial court's rulings sustaining the motions for summary judgment and for dismissal. The Court can only act on the record. The fact that the law was changed as to immunity for the State effective January 1, 1975, does not authorize or warrant the Court in setting aside proper legal orders of the trial court.

Accordingly, the court finds that the assignments of error are not well taken and the judgment is affirmed.

CRAWFORD, P. J. AND WHITESIDE, J., CONCUR.

CRAWFORD, P. J. AND BUZZARD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

WHITESIDE, J. OF THE TENTH APPELLATE DIS-

TRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court will place of record its own entry in the within cause within ten days from the release of this Opinion.

APPENDIX D

COURT OF APPEALS
FIRST APPELLATE DISTRICT
WARREN COUNTY, OHIO

No. CA 31

JANENE RILEY, BY AND THROUGH HER MOTHER AND NEXT FRIEND DELORES RILEY, AND DELORES RILEY,

Appellants,

vs.

BETTY STEPHENS, SHELL OIL CO., LOVELAND OIL CO., WARREN COUNTY EMPLOYEES, AND STATE OF OHIO EMPLOYEES,

Appellees.

JUDGMENT ENTRY

(Filed September 5, 1975)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Warren County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Warren County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants by his counsel, excepts.

APPENDIX E

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al,
Plaintiffs,

vs.

BETTY STEPHENS, et al,
Defendants.

DECISION AND JUDGMENT ENTRY

(Filed ————)

This matter is before the Court upon a Motion for Summary Judgment on behalf of the defendant, Shell Oil Company, and against the plaintiffs. Plaintiffs predicate their claim against the defendant, Shell Oil Company, on the contention that the plaintiff's injuries were caused by the defendant, John C. Daunt, and that at the time of the injuries the said John C. Daunt was an employee of Shell Oil Company and was driving the said truck in the scope of his employment for Shell Oil Company.

For the purpose of this motion the Court has before it the pleadings, the memoranda of the respective parties, the answers to interrogatories and affidavits of Shell Oil Company and the defendant, John C. Daunt. The Court is of the opinion that there is no genuine issue as to any

material fact for the same reasons as set out by this Court in its decision of March 24, 1971, in a companion case of *Walker* v. *Loveland Oil Inc., et al,* Case No. 32294.

In the instant case plaintiffs have raised the additional argument that they are entitled to the benefit of an inference to the effect that defendant, Shell Oil Company, was the owner of the subject truck and that it was being used in the business of Shell Oil Company. For this contention plaintiff cites the twin cases of *McDougall* v. *Glenn Cartage Company,* 169 O.S. 522, and *Cincinnati Transit Inc.* v. *Tapley,* 28 O.App. 2d 26. This Court is of the opinion that the instant case must be distinguished from those two decisions. In each of those cases the Court had before it no direct evidence whatsoever as to the ownership and employment of the vehicle in question, and therefore, was obliged to permit plaintiff the inference that the vehicle was owned and used in the business of the person whose name appeared on the truck. It is true that the evidence before the Court in the instant case shows that the only markings on the truck were the word "Shell". However, there is additional evidence as to the matter of ownership and employment before the Court. Defendant Daunt says that he alone owned the truck. Defendant, Shell Oil Company, says that Daunt alone owned the truck. Defendant Daunt says that the truck was being operated in his own business and not that of Shell Oil Company. Shell Oil Company says that it had no connection with the operation of the truck whatsoever. Plaintiffs have submitted no evidence or facts to the Court to refute any of these statements. To permit an inference that would be exactly contrary to the established evidence appears to this Court to be beyond the reasoning or the decision of the Supreme Court in *McDougall* v. *Glenn Cartage Company,* Supra.

Therefore, the Court concludes that there is no genuine issue as to any material fact and that defendant, Shell Oil Company, is entitled to judgment as a matter of law. The Motion of said defendant is sustained and judgment will be entered in its behalf.

Exceptions of the plaintiffs are reserved.
Dated: June 6, 1972.

/s/ P. DANIEL FEDDERS
Judge

[Judgment Entry will be filed as of June 9, 1972]

CC: Lindhorst & Dreidame
Leo F. Krebs
Edward J. Utz
Brumleve, DeCamp & Wood
William L. Bubenzer
Altick, McDaniel & Radabaugh

APPENDIX F

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS,
Defendant.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER,
Defendant.

DECISION AND JUDGMENT ENTRY

(Filed ————————)

Fedders, J.:

The Defendant Shell Oil Company is hereby dismissed as a party Defendant to the Third Amended Complaint

for the reasons set out by the Court in its decision of June 9, 1972.

/s/ P. DANIEL FEDDERS
Judge

April 22, 1974.

ss: Leo J. Breslin, Esq.
Edward J. Utz, Esq.
Wilson Brumleve, Esq.
Hugh Altick, Esq.
John J. Adams, Esq.
Leo F. Krebs, Esq.
Peter Swenty, Esq.

APPENDIX G

COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, by and through her mother and next friend DELORES RILEY, et al.,
Plaintiffs,

vs.

BETTY STEPHENS, et al.,
Defendants.

Case No. 34697

JANENE RILEY, by and through her father and next friend, ROBERT L. RILEY, JR.,
Plaintiffs,

vs.

KENNETH B. GAVER, M.D., et al.,
Defendants.

JUDGMENT ENTRY

(Filed May 15, 1974)

The jury, on a former day, having found the issues in this consolidated case in favor of plaintiff Janene Riley in the sum of Two Million ($2,000,000.00) Dollars and

costs, and in favor of the plaintiff, Robert L. Riley, Jr., in the sum of Thirty Thousand ($30,000.00) Dollars, and costs, against Betty Stephens and Loveland Oil Company, judgment is herewith rendered in favor of plaintiff Janene Riley in the sum of Two Million ($2,000,000.00) Dollars and costs, and in favor of the plaintiff, Robert L. Riley, Jr., in the sum of Thirty Thousand ($30,000.00) Dollars and costs, against each of said defendants.

.....

Judge Fedders

.....

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.....

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.....

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APPENDIX H

COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS, et al.,
Defendants.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER, M.D., et al.,
Defendants.

ENTRY OVERRULING MOTIONS OF DEFENDANT LOVELAND OIL COMPANY FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

(Filed August 5, 1974)

This matter coming before the Court upon the motions of defendant Loveland Oil Company for judgment not-

withstanding the verdict, and for a new trial, the Court, being fully advised in the premises and after oral argument and submission of briefs, finds said motions, and each of them, not well taken and denies same.

The judgment in the within cause heretofore entered on May 13, 1974, is herewith reaffirmed.

Exceptions to defendant Loveland Oil Company.

/s/ P. DANIEL FEDDERS
Judge

/s/ LEO J. BRESLIN
LINDHORST & DREIDAME
Attorneys for Plaintiffs
1200 American Building
Cincinnati, Ohio 45202
421-6630

/s/ JOHN J. ADAMS
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1377 East Stroop Road
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APPENDIX I

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS,
Defendant.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER,
Defendant.

DECISION AND JUDGMENT ENTRY

(Filed ————————)

Fedders, J.:

This matter is before the Court upon Motions for summary judgment and Motions to dismiss filed by the various Defendants against the complaints filed in these two cases.

From the voluminous pleadings, memoranda, interrogatories, stipulations of fact and pre-trial conferences, it is obvious that the Plaintiff's complaint against these moving Defendants is grounded in the theory that the Defendant Betty Stephens, school bus driver, was either directly or indirectly an employee of one or more of the various Defendants. All of the moving Defendants are governmental agencies of either state or county level.

The Court can find nothing in the allegations of fact or legal arguments so far submitted by which this case can be excluded from the concept of official governmental immunity embodied in the cases of *Schaffer* v. *Board of Trustees,* 171 O.S. 228; *Commissioners of Hamilton County* v. *Mighels,* 7 O.S. 109; *Tinsley* v. *Cincinnati, et al,* 5 O.O. (2d) 454; *Broughton* v. *Cleveland,* 167 O.S. 29.

The Court therefore concludes that there is no genuine issue as to any material fact and that the complaint fails to state a claim against these moving Defendants upon which relief can be granted.

The following Defendants are dismissed:

State of Ohio — Bennett J. Cooper, Director, Department of Rehabilitation and Correction

State of Ohio — Dr. Kenneth Gaver, Director, Department of Mental Health and Mental Retardation

All past and present members of the Board of County Commissioners of Warren County, Ohio

All past and present members of the Warren County Board of Mental Retardation

Greenknoll School

April 22, 1974.

/s/ P. DANIEL FEDDERS
Judge

cc: Leo J. Breslin, Esq.
Edward J. Utz, Esq.
Wilson Brumleve, Esq.
Hugh Altick, Esq.
John J. Adams, Esq.
Leo F. Krebs, Esq.
Peter Swenty, Esq.

MAY 27 1976

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,
Petitioners,

v.

BETTY STEPHENS, et al,
Respondents.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The opinions of the Court of Common Pleas and of the Court of Appeals are set forth in the Petition for Certiorari heretofore filed with this Court.

QUESTION PRESENTED FOR REVIEW

May a state court apply the doctrine of sovereign immunity in dismissing the State of Ohio and its employees, Directors of the Department of Rehabilitation and Cor-

rection and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren County, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School, without thereby denying the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

To this the Members of the Board of County Commissioners of Warren County, Ohio say YES.

STATEMENT OF THE CASE

The Statement of the Case set out in the Petition is correct and adopted by Respondent, The Members of the Board of County Commissioners of Warren County, Ohio.

THE WRIT SHOULD BE DENIED

The Members of the Board of County Commissioners contend that the Courts of Ohio were correct in their decision and:

1. That there is no conflict with the recent decision of this Court in *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974), and the laws of the State of Ohio.

2. That the petitioners were not effectively deprived of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

Counsel for the Petitioner in this case has argued that the case of *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974), applies in this case. We submit that the concept of governmental immunity set forth in the case of *Schaefer* v. *Board of Trustees,* 171 Ohio St. 228, 168 N.E. 2d 547, cannot be abrogated by the judiciary. It is submitted that the constitutional provision that suits may be brought against a state, in such courts and in such manner as may be provided by law, is not self executing but requires passage of legislation to activate it, and in the absence of statutory authorization the state and its instrumentalities, including counties and their agencies are completely immune from suit for negligence. *Constitution, Article I, § 16 (Appendix I), Ohio Rev. Code § 305.12.*

Appendix II Warren County is a sub-division of the State of Ohio organized for judicial and political purposes and it is not a legal person or a separate political entity. It differs from the municipal corporation in that the municipal corporation is a corporation invested with certain powers of a private or proprietary nature. Ohio has held that the framers of its Constitution clearly recognized the doctrine of sovereign immunity, as a part of the substantive law of Ohio and made the abrogation of such immunization a legislative function. "Although such provision is not in our constitution, it is not self-executed but recognizes the passage of legislation to activate it." *Wolfe* v. *Ohio State University Hospital,* 170 Ohio St. 49, 162 N.E. 2d 475. In *Commissioner's of Hamilton County* v. *Mighels,* 7 Ohio St. 109, at page 110 the Ohio Supreme Court held:

"The Board of Commissioners of the County are not liable in their quasi-corporation capacity either by statute or said common law to an action for damages where injury resulting to a private party by their negligence in the discharge of their official functions."

We take issue with the allegation of the Petitioner that the doctrine is judicially created, and, as such, can be abrogated by the judiciary. The Supreme Court of Ohio has held that the immunity of the state of Ohio from suit where damages are sought is a creature of the Ohio Constitution. The most important case on this point is *Krause* v. *State,* 31 Ohio St. 2d 132, 285 N.E. 2d 736 *cert. denied,* 409 U.S. 1052, *rehearing denied,* 410 U.S. 918. The Supreme Court of Ohio held:

"1. The State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly. (*Raudabaugh* v. *State,* 96 Ohio St. 513; *Palumbo* v. *Indus. Comm.,* 140 Ohio St. 54; *State ex rel. Williams* v. *Glander,* 148 Ohio St. 188; and *Wolf* v. *Ohio State University Hospital,* 170 Ohio St. 49, 162 N.E. 2d 475, approved and followed.)

2. Section 16 of Article I of the Ohio Constitution, Appendix I as amended September 3, 1912, abolished the defense of governmental immunity and empowered the General Assembly to decide in what courts and in what manner suits may be brought against the state.

3. Section 16 of Article I of the Ohio Constitution, as amended September 3, 1912 provides that '. . . Suits may be brought against the state in such courts and in such manner as may be provided by law,' is not self-executing, and statutory consent is a prerequisite to such suit." (*Raudabaugh, Palumbo, Williams,* and *Wolf, supra,* approved and followed.) 31 Ohio St. 2d at 132, 285 N.E. 2d 736, 737.

The Supreme Court of Ohio speaking through Chief Justice O'Neill rejected petitioner's judicial abrogation theory when he stated:

"Although the doctrine of governmental immunity was originally judicially created, it is not now subject to judicial re-examination. When the people of Ohio, in 1912, adopted Section 16 of Article I as part of the organic law of this state, they foreclosed to this or any other court the authority to examine the 'soundness' or 'justice' of the concept of governmental immunity. The people of Ohio placed that policy decision in the hands of the General Assembly, and the merits or demerits of granting or withholding consent are to be debated and determined by that body alone. It is not within the province of the judiciary to make that determination. Nor can we make that constitutional provision meaningless. The alternative remedy is by constitutional amendment." 31 Ohio St. 2d 132, 147, 285 N.E. 2d 736, 745.

This theory was followed in *Thacker, et al.* v. *Board of Trustees,* 35 Ohio St. 2d 49, 298 N.E. 2d 542. In both *Krause* and *Thacker, supra,* the Ohio Supreme Court rejected the judicial abrogation theory. It is clear by reading the dissents in both cases, especially those of Justices Corrigan and W. Brown in *Thacker,* that the Court was explicitly rejecting the modern trend argument as put forth by Petitioners.

With respect to the respondents, the Warren County Commissioners, this case involves an appeal from a decision and judgment entry of the trial court affirmed by the Court of Appeals and certification refused by the Supreme Court of Ohio from a decision and judgment entry

of the trial court, dismissing "all past and present members of the Board of County Commissioners of Warren County, all past and present members of the Warren County Board of Mental Retardation Green Knoll School." The Court stated in making its ruling:

> "The court can find nothing in the allegations of fact or legal argument so far submitted by which this case can be excluded from the concept of official governmental immunity embodied in the cases of *Schaffer* v. *Board of Trustees,* 171 Ohio St. 228; *Commissioners of Hamilton County* v. *Mighels,* 7 Ohio St. 109; *Tinsley* v. *Cincinnati, et al.,* 5 O.O. 2d 454; *Broughton* v. *Cleveland,* 167 Ohio St. 29."

Relying upon those decisions, the courts of Ohio, have in effect, affirmed the decision of the trial court which is stated: "That there is no genuine issue to any material fact and that the Complaint fails to state a claim against these moving defendants, upon which relief can be granted."

The only allegations referring to the Warren County Commissioners, Case No. 31697, below, are contained in Paragraph 10 of the Third Amended Complaint which states:

> "That at the time and place the defendant, Betty Stephens, was an employee and agent, acting in the course and scope of her agency for defendants, the State of Ohio, the Department of Rehabilitation and Correction and the Department of Mental Health and Mental Retardation, Warren County Commissioners, The Warren County Board of Mental Retardation, and Green Knoll School, The Warren County School for retarded children. Said defendants hired and maintained a know negligent agent by employing Betty Stephens; and, said defendants negligently entrusted a 1967 International School Bus to Betty Stephens and

> they knew, or should have known, of Betty Stephens' tendency to drive wrecklessly (sic)."

In case No. 34697, below, it was alleged:

> "1. That the defendants, Dr. Harry Coronett (sic), Arch Hildebrand and Robert K. South, constitute the duly elected qualified and acting Board of County Commissioners of Warren County, Ohio.
>
> "2. That the defendants, Thelma S. Sumner, Joe Smallwood, Dorothy Scholl, Donald G. Slorp, Warren Hauser, Kyle Cook, Marian Snyder and Sylvia Gross, constitute the duly appointed, qualified and acting Board of Mental Retardation of Warren County, Ohio . . .
>
> "12. That at all times mentioned herein, that, Betty Stephens, was the employee and/or agent and/or sub-agent of the Ohio Department of Mental Hygiene and Correction and/or the Division of Mental Retardation of the State of Ohio and/or the Warren County, Ohio Board of Mental Retardation and/or the Warren County, Ohio Board of County Commissioners acting within the scope of her employment and/or agency and/or subagency."

We submit that the courts of Ohio correctly sustained the Motion for Summary Judgment filed on behalf of the Warren County Commissioners based upon the doctrine of governmental immunity.

Petitioners state "the doctrine of governmental immunity has been judicially created and, as such, it can be abrogated by the judiciary." Petitioners' brief, page 9. While it is true that this doctrine has judicial approval in this state, it also had, until January 1, 1975, implied legislative approval by reason of the enactment of Sec. 127.11 (Appendix

III), establishing the Sundry Claims Board. If there was any doubt that this Section recognized the legislative approval of the doctrine of governmental immunity, it was clearly put to rest by the enactment of Chapter 2743 (Appendix IV), of the Revised Code in which the legislature declared that, "the State hereby waives its immunity from liability and consents to be sued" (2743.02 R.C.). Surely, the legislature of the State of Ohio could not waive immunity from liability if it did not recognize that such immunity already existed. Furthermore, Sec. 2743.01 (A) provides, in fact, that the waiver by the State does not include political subdivisions and Sec. 2743.01 (B) provides that political subdivisions include, "Municipal Corporations, Townships, Villages, Counties and School Districts and all other bodies corporate and politics responsible for governmental activities only in geographic areas smaller than that of the State, to which the sovereign immunity of the State attaches." It is obvious therefore that the legislature intended for a limited waiver of the rule of sovereign immunity beginning January 1, 1975. It seems to us that it would be grossly improper for a judicial body to overrule that legislative determination and statement of policy.

Petitioners contend that the doctrine of governmental immunity is no longer an automatic bar to claims for damages against the State, County or Board of Education officials, relying on *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90, 94 S.Ct. 1683 (1974). Petitioners' reliance upon *Scheuer* is misplaced. This Court held in that case that in varying scope, qualified immunity to suit is available to officers of the executive branches of government, the variations being dependent upon the scope of discretion and responsibilities of office, and all circumstances as they reasonably appear at the time of action on which liability is sought to be based, and the existence of rea-

sonable grounds for belief formed at the time and in light of all the circumstances that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct.

In *Scheuer,* this Court held, at page 237:

> "However, since Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.' Id., at 159-160, 28 S.Ct., at 454. (Emphasis supplied.)"

There is no allegation, whatever, in the Complaints in this case that the respondents have deprived another of a federal right under the color of state law. There are no allegations in this case that the respondent County Commissioners' acts were intentional, reckless, willful and wanton, and, thereby deprived plaintiff of her property or life without due process of law, and therefore *Schueur* has no application to this case.

In *Scheuer* the statute relied upon and included within its scope:

> "'(M) isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is

clothed with the authority of state law,' id., at 184, 81 S.Ct., at 482 (quoting *United States* v. *Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe* v. *Pape, supra,* the legislative history indicates that there is no absolute immunity. Soon after *Monroe* v. *Pape,* Mr. Chief Justice Warren noted in *Pierson* v. *Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967), that the 'legislative record (of § 1983) gives no clear indication that Congress meant to abolish wholesale all common-law immunities,' Id., at 554, 87 S.Ct., at 1218. The Court had previously recognized that the Civil Rights Act of 1871 does not create civil liability for legislative acts by legislators 'in a field where legislators traditionally have power to act.' *Tenney* v. *Brandhove,* 341 U.S. 367, 379, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951). Noting that '(t)he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries,' id., at 372, 71 S.Ct., at 786, the Court concluded that it was highly improbable that 'Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by convert inclusion in the general language . . .' of this statute. Id., at 376, 71 S.Ct., at 788."

CONCLUSION

This is clearly a negligence case and not a case of the individual liability of a public official acting in his public capacity where the issue is whether he acted in good faith in claiming an emergency and the actions taken to cope with the emergency so declared. In this case there is no question about an emergency nor is there a question of good faith. It is clearly a question of negligence. A negligence case has been decided by the Courts of Ohio and the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I

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§ 305.12 Liability of commissioners. (GC § 2408)

The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county. The money so recovered shall be paid into the county treasury, and the board shall take the county treasurer's receipt therefor and file it with the county auditor.

APPENDIX II

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§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

APPENDIX III

§ 127.11 Sundry claims board.

There is hereby created a "sundry claims board" to consist of the director of finance or an employee in his department designated by him, who shall be in the unclassified service, who shall be president, the auditor of state who shall be secretary, the attorney general, the chairman of the senate finance committee, and the chairman of the finance commttiee of the house of representatives. In the event of the absence, illness, disability, death, or resignation of the chairman of the house finance committee, the speaker of the house or a member of the house designated by him may serve in place of the chairman of the house finance committee as a member of the sundry claims board until the return of such chairman or the appointment of another chairman. In the event of the absence, illness, disability, death, or resignation of the chairman of the senate finance committee, the president pro tempore of the senate or a member of the senate designated by him may serve in the place of the chairman of the senate finance committee as a member of the sundry claims board until the return of such chairman or the appointment of another chairman. While a member of the sundry claims board, the member of the general assembly shall be entitled to compensation for service as provided in this section for the chairman of either the house or senate finance committee. The board may receive original papers representing claims against the state. Such claims shall be filed and properly designated either by number or short title, or both. All such claims shall be carefully investigated by such board. The president of the board may administer oaths, compel

the attendance of witnesses, and compel the production of books and papers. He may punish for disobedience of subpoena, for refusal to be sworn or to answer as a witness, or for failure to produce books and papers, in the same manner as officers authorized to take depositions. After such investigation, the board shall either approve, approve with conditions and limitations, or disapprove each such claim, and append to the original papers representing each claim, a concise statement of facts brought out in such investigation upon which its approval or disapproval is based. Such original papers and appended statements shall be filed in the office of the department of finance, and delivered to the chairman of the finance committee of the house of representatives of the next general assembly promptly upon the appointment of such chairman. A copy of the appended statement shall be kept on file in the office of the department and, together with the original papers representing such claims and any other matters pertaining thereto, shall be kept on file for a period of ten years.

When any claim filed with it has been approved by the board in an amount of one thousand dollars or less, the auditor of state, upon being presented with a voucher for the payment thereof signed by the president and secretary of the board, shall, if money has been appropriated for the payment thereof, issue his warrant drawn on the treasurer of state in the amount set out in such voucher. In February of each odd-numbered year beginning in 1963 the director of finance shall estimate the cost of paying all the claims in an amount of one thousand dollars or less to be allowed by the board during the next succeeding biennium. He shall submit the estimate to the chairman of the finance committee of each house to allow the general assembly to appropriate funds for the payment of claims in an amount

of one thousand dollars or less which may be allowed by the board during the next succeeding biennium.

A per diem of thirty-five dollars for each day actually spent by the chairman of the finance committee of the senate and house of representatives, respectively, while in the performance of the duties enumerated in this section, and upon the summons of the president of the board, together with their necessary expenses, shall be paid from the funds appropriated for the expense of legislative committees upon vouchers approved by the president and secretary of the board. This section shall not be construed to conflict with section 101.26 of the Revised Code.

APPENDIX IV

§ 2743.01 [Definitions.]

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

§ 2743.02 [State waives immunity from liability.]

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This chapter is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to the effective date of this section.

(C) Such hospital may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.

Supreme Court, U. S.
FILED
JUN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-1617

JANENE RILEY, by and through
her mother and next friend
DELORES RILEY, et al.,
Petitioners,

-vs-

BETTY STEPHENS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENTS OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION AND OHIO DEPARTMENT OF REHABILITATION AND CORRECTION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 75-1617

JANENE RILEY, by and through
her mother and next friend
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENTS OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION AND OHIO DEPARTMENT OF REHABILITATION AND CORRECTION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether *Scheuer v. Rhodes*, 416 U.S. 232 (1974), bars the State of Ohio as the real party in interest from invoking the defense of sovereign immunity in a negligence action filed in a State of Ohio Court.

2. Whether a state court's application of the doctrine of sovereign immunity to a suit brought against the State of Ohio and County of Warren, Ohio, denies

the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The instant action with respect to the State of Ohio respondents arose upon a complaint filed in the Court of Common Pleas of Warren County, Ohio by petitioner herein Janene Riley through her father, Robert Riley on February 18, 1972. The original complaint alleged Janene Riley had suffered personal injuries due to the negligence of Betty Stephens and John C. Daunt individually and/or jointly. Mrs. Stephens was alleged to have operated a bus on February 22, 1968 in negligent fashion thereby striking and injuring Janene Riley. Mr. Daunt was alleged to have stopped his truck suddenly thereby causing Mrs. Stephens to swerve the school bus she was operating into Janene Riley. The complaint also named the State of Ohio through Kenneth D. Gaver, M.D., Acting Director of the Department of Mental Hygiene and Correction and Roger Gove, Commissioner of Mental Retardation and its members and its County Commissioners as parties. These governmental parties were named as a result of an alleged agency or sub-agency between the entities they represented and Mrs. Stephens. Also named were Shell Oil Co., Loveland Oil Co., and Kenneth Hughes.

On May 23, 1972, the above action was consolidated with an identical case that had been filed approximately three (3) years prior to its filing by Janene Riley's mother, Delores Riley.

On April 22, 1974, after petitioners had filed a Third Amended Complaint substituting State of Ohio, Bennett J. Cooper, Director, Department of Rehabilitation and Correction for the State of Ohio, Roger Gove, Commissioner of Mental Retardation, the court sustained the State of Ohio respondents' Motion to Dismiss and the Warren County respondents' Motion for Summary Judgment on the basis of governmental immunity.

Trial of the action with respect to Betty Stephens and Loveland Oil Company was held in May, 1974 resulting in a verdict in favor of Janene Riley and Robert Riley, her father, against these parties. Such finding was reflected in a Judgment Entry dated May 13, 1974. After the court overruled Loveland Oil Company's motion for judgment notwithstanding the verdict and for new trial, an appeal was filed in the Court of Appeals, First Appellate District of Ohio.

On September 15, 1975, the Court of Appeals affirmed the judgment of the trial court. In its opinion, the Court rejected petitioners' contentions that *Scheuer v. Rhodes*, 416 U.S. 232 (1974) was applicable to the instant fact situation and that their rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution had been violated.

On October 23, 1975, petitioners filed a Notice of Appeal to the Supreme Court of Ohio in the Court of Appeals. On February 5, 1976, the Ohio Supreme Court dismissed that appeal for want of a substantial constitutional question.

REASONS WHY THE WRIT SHOULD NOT BE ISSUED

Respondents State of Ohio, Department of Mental Health and Mental Retardation and State of Ohio Department of Rehabilitation and Correction do not believe the questions presented herein are sufficiently meritorious to invoke the discretion of this Court. Rule 19, Rules of the Supreme Court: *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *National Labor Relations Board v. Pittsburg S.S. Co.*, 340 U.S. 498 (1951). Not only have the lower state courts and Ohio Supreme Court determined that such claims are without merit, but respondents would assert that neither a federal question not previously determined by this Court nor a decision not in accord with prior applicable decisions is involved.

Petitioners' attempt at application of this Court's opinion in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), to the present fact situation thus allegedly raising a jurisdictional issue pursuant to 28 U.S.C. Section 1257 (3) is misplaced. The Court of Appeals, First Appellate District of Ohio correctly held that in the present context there was no federal question necessitating any consideration of *Scheuer, supra.*

In *Scheuer v. Rhodes, supra*, this Court held that where a state official is alleged to have acted either outside the scope of his lawful authority, or if within the scope of his authority in an arbitary manner grossly abusing the lawful powers of his office, then for purposes of the complaint he is stripped of his representative capacity and is being subjected to personal liability. In the context of an action brought pursuant to the Civil Rights Act (42 U.S.C. Section 1983) neither the Eleventh Amendment nor the doctrine of

governmental immunity are bars to jurisdiction without some exploration of the particular facts.

The present action is not based upon the Civil Rights Act nor does the Complaint allege any violation of state or federal law, abuse of the power of one's office, or personal act or omission on the part of any state official. It is a simple negligence action in which the directors of two state agencies have been named in their official capacities and a money judgment is sought against the Treasury of the State of Ohio.

Since no federal question is raised in the complaint the law of Ohio determines whether the State of Ohio is the real party in interest. This Court's considerations in *Scheuer, supra*, in which it was determined that the plaintiffs should be permitted an opportunity to determine whether the defendants were acting lawfully is not at issue. It is the law of Ohio that although a suit may name the head of a state agency as a party where a judgment from the state treasury is sought the suit is in essence against the state. *State ex rel. Williams v. Glander*, 148 Ohio St. 188, *cert. denied*, 332 U.S. 817 (1917); *Reed v. Timmerman*, 65 Ohio Ops. 18, 29 N.E. 2d 446, *dismissed for want of debate q.* 137 Ohio St. 524 (1940); *Farkas v. Fulton*, 51 O. App. 92, 40 O. Ops. 527, 199 N.E. 848, *aff'd* 130 Ohio St. 390, *reh. den.* (1936); *State ex rel. Board of County Commis. v. Rhodes*, 88 O.L. Abs. 390, 177 N.E. 2d 557 (Mahoning Co. 1961); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959); *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49 (1973).

The Ohio real party in interest test is based upon substantial precedent established by this Court. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford v. Department of Treasury*, 323 U.S. 459 (1945); *State High-*

way Comm. v. Utah Construction Co., 278 U.S. 194 (1928); *Smith v. Reeves*, 178 U.S. 436 (1900); *Hagwood v. Southern*, 117 U.S. 52 (1886); *Louisana v. Jummel*, 107 U.S. 711 (1882).

Petitioners are unable to cite any authority for their application of *Scheuer v. Rhodes, supra* to the instant fact situation. Such an application would lead to a conclusion that the doctrine of sovereign immunity no longer exists. It is submitted that this Court did not intend such a result in *Scheuer*.

Petitions also support their application for the present writ on the theory that application of the doctrine of sovereign immunity results in a deprivation of their right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

In addressing this issue in *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, *appeal dismissed*, 409 U.S. 10052, *Reh. Den.* 410 U.S. 918 (1973), the Ohio Supreme Court held that Article I, Section 16 of the Ohio Constitution which provides:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have justice administered without denial or delay.
>
> Suits may be brought against the State in such courts and in such manner as may be provided by law",

neither is unconstitutional on its face nor as applied. Chief Justice O'Neill reasoned that it is not a deprivation of due process or equal protection to recognize by combined legislative judgment substantive differences between the conduct of private tortfeasors and governmental tortfeasors. The court relied upon two decisions of this Court; *Tigner v. Texas*, 310 U.S. 141, at 147 (1940) and *Reed v. Reed*, 404 U.S. 71, at 75 (1971).

The Ohio Supreme Court's rationale has been followed in other states. *Brown v. Commonwealth*, 453 Pa. 566, 305 A. 2d 868 (Pa. 1976); *Sousa v. State*, 341 A. 2d 282 (N.H. 1975); *Kreiger v. South Oakland County Mutual Aid Pact., et al.*, 49 Mc A 7, 211 N.W. 2d 228 (C.A. Mich. 1973); *Dairyland Insurance Co., Inc. v. Board of County Commissioners, County of Bernalillo*, 538 P. 2d 1202 (N.M. 1975); *Lundbeck v. State Department of Highways*, 95 Ida. 459, 511 P. 2d 1325 (Ida. 1973); *O'Dell v. School District of Independence, Mo.* 521 S.W. 2d 403, *cert. denied* ..... U.S. ....., 96 S. Ct. 125, 46 L. Ed. 2d 94 (Mo. 1975).

Petitioners cite no cases in their application for a writ which have addressed the constitutional issue and decided it favorably to their position. In fact those state courts which have judicially abrogated the doctrine of sovereign immunity have done so on public policy grounds alone. See for example: *Muskopf v. Corning Hospital District*, 115 Cal. 2d 211, 359 P. 2d 457 (Cal. 1961); *Caroll v. Kittle*, 203 Kans. 841, 457 P. 2d 21 (Kans. 1969); *Perkins v. State*, 252 Ind. 549, 251 N.E. 2d 30 (Ind. 1969). States such as Ohio have decided the sovereign immunity question on the basis of state constitutional or statutory law. See *Krause v. State, supra.* Respondents would submit that such considerations do not rise to a significant constitutional level thereby jusifying this Court to invoke jurisdiction. Petitioners' attempt at reliance upon the judicial abrogation theory and upon public policy considerations in their petition does not justify granting this writ.

Finally with respect to any alleged denial of equal protection or due process by the State of Ohio vis a vis these petitioners, respondents would point out the petition takes a contradictory position. On page 12, petitioners asserts such a deprivation. Then on page

13, they contend now that the State of Ohio legislatively has waived its immunity from suit and created a court of claims (Chapter 2743, Ohio Revised Code), they have a cause of action therein.

CONCLUSION

In summary, respondents Ohio Department of Mental Health and Mental Retardation and Ohio Department of Rehabilitation and Corrections believe this case presents no special and important reasons justifying this Court to invoke its jurisdictions under 28 U.S.C. Section 1257(3). There is no federal question herein requiring application of *Scheuer v. Rhodes, supra.* Petitioner's equal protection and due process issues have been uniformally rejected by state courts considering them in the context of the sovereign immunity doctrine. Abrogation of a sovereign immunity defense is a problem that should be addressed solely by courts of the states on public policy considerations or application of state law. For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief were forwarded to Leo J. Breslin, Esq., Attorney for Petitioners, 1200 American Building, Cincinnati, Ohio 45202 and three (3) copies to Edward T. Utz, Esq., Attorney for Respondent, Warren County Board of Mental Retardation, 4th and Walnut Building, Cincinnati, Ohio 45202, this ..... day of ....., 1976 via the United States Postal Service.

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Assistant Attorney General

Supreme Court, U. S.
FILED
JUN 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al.,

Petitioners,

vs.

BETTY STEPHENS, et al.,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This reply brief on behalf of Petitioners herein is filed pursuant to Rule 24, Rules of the Supreme Court. The purpose of filing this brief is to respond to certain statements contained in the brief filed by the Respondents Warren County Commissioners opposing the petition for a Writ of Certiorari.

Respondents have asserted that the instant petition presents no conflict with this Court's decision in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), and that no deprivation of constitutional rights is presented by this case. For reasons which are set forth herein, Petitioners respectfully submit that Respondents' interpretation of the decision in *Scheuer* v. *Rhodes* is incorrect, and that the circumstances of this

action bring before the Court in the clearest and purest form imaginable the constitutional deprivations which result solely and directly by virtue of the application of the doctrine of sovereign immunity.

As correctly noted in Respondents' brief, Petitioners did allege in the trial court that said Respondents were negligent in hiring Betty Stephens. Petitioners have already pointed out to this Court that during the trial involving the remaining defendants there was strong evidence that the school bus driver not only was untrained in the operation of her vehicle, but had complained frequently to her superiors that she was unable to handle it properly. These allegations thus bring this case squarely within the holding of *Scheuer,* in which damages were being sought in redress for the tortious conduct of the state officials. Just as those individuals had a personal interest in the outcome of the case, Cf. 416 U.S. at 237-38, the Respondents have such an interest in the outcome of this case. The Supreme Court of Ohio, in affirming the Appeals Court's affirmance of the Respondents' motion for summary judgment, has held that sovereign immunity is an absolute bar to any and all actions for damages against governmental officials even where it is alleged that they were personally negligent in their conduct toward the minor plaintiff.

Respondents argue, however, that Petitioners were not effectively deprived of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. Petitioners submit that it is in precisely this regard that their claims for redress from his Court are the most deserving. As Justice Cardozo once stated:

> "I think that when a rule, after it is has been duly tested by experience, has been found to be inconsistent with the sense of justice, or with the social welfare, there should be less hesitation in frank avowal and full abandonment."

Cardozo, *The Nature of the Judicial Process,* page 152, Yale University Press (1921).

If ever a set of circumstances presented the case of a rule which has been tested by experience and found wanting, it is that presented by this petition. The Petition for Writ of Certiorari previously filed herein referred to the opinion of Justice Traynor in *Muskopf* v. *Corning Hospital District,* 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), in which that Court eloquently abolished the sovereign immunity doctrine in California. To date, no fewer than 21 states have abolished sovereign immunity in tort, with the most recent decision coming from the Supreme Court of Minnesota. Thus, Alaska (1973), Arizona (1963), California (1961), Colorado (1971), Hawaii (1968), Idaho (1970), Illinois (1967), Indiana (1972), Iowa (1975), Kansas (1975), Minnesota (1975), Nebraska (1971), New Jersey (1970), New Mexico (1975), New York (1963), Oregon (1974), Pennsylvania (1973), Utah (1968), Vermont (1973), Washington (1974) and Wisconsin (1962), have accomplished this end either by statutory means or by judicial fiat. See cases collected in *Nieting* v. *Blondell,* 235 N.W.2d 597, 602, Note 9-13 (Minn. 1975).

An immunity in the legal sense, which avoids liability under all circumstances, is conferred, not because of the particular facts of a case, but because of the status or position of the favored party; it does not deny the tort, but only the resulting liability. W. L. Prosser, Law of Torts, 996 (3d Ed. 1964). Concerning the history and effect of the doctrine of sovereign immunity, the California Supreme Court, speaking through Chief Justice Traynor in the case

of *Muskopf* v. *Corning Hospital District, supra,* had this to say:

> ". . . At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the King, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' . . ." 55 Cal.2d 211 at 214, 11 Cal. Rptr. 89 at 90-91, 359 P.2d 457 at 458, 459 (1961).

The following discussion of the evolution of the doctrine, which appears in *Smith* v. *State,* 93 Idaho, 795, 473 P.2d 937 (1970), confirms Justice Traynor's observation:

"The early case of Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812), set precedent which has been followed by most state courts in the United States. As sometimes is the case, a court will enunciate a principle of law, citing authorities and reasons supporting its decision, only to find that in time the case is widely cited for a proposition of law unrelated to the original question presented by the case. The Supreme Judicial Court of Massachusetts in Mower v. Inhabitants of Leisester, supra, relied on the reasoning of an earlier English case, Russel v. The Men of Devon, 100 Eng. Rep. 359 (K.B. 1788), in which the court held that an unincorporated governmental unit was not liable for injuries resulting from a defective bridge since it was better that an individual should sustain an injury than the public should suffer the inconvenience of collecting monies and then paying them to the injured party. It is evident there was no basis in law or fact for the Massachusett's

> court in Mower v. Inhabitants of Leicester, supra, to apply the rule of Russel v. The Men of Devon, supra, since the town of Leicester was incorporated and could have satisfied a judgment. Yet in spite of these distinguishing features the rule became firmly entrenched not only in Massachusetts but also in the majority of American jurisdictions." 473 P.2d at 942.

In short, sovereign immunity is a doctrine whose genesis was accidental, and whose perpetuation is the result of inertia.

One of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their persons, properties and characters. The logical extension of that interest, is that, if harm is wrongfully inflicted upon an individual in such a society, he should have an opportunity to obtain a reasonable and adequate remedy against the wrongdoer, either to undo the harm inflicted or to provide compensation therefor. If the state is to properly serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good. See *Nieting* v. *Blondell, supra.*

The decisions of the Ohio courts in this case conflict not only with the constitutional rights to equal protection and due process of law of the petitioners but with the decisions and statutory enactments in the 21 jurisidictions enumerated above as well. Sovereign immunity runs directly contrary to the basic concept, underlying the entire field of tort law, that liability follows negligence and that individuals and corporations are responsible for the negligent acts of their agents and employees acting in the

course of their employment. Petitioners, however, have thus far been denied their opportunity for redress for the loss of the minor Petitioner's legs, brought about by the negligence of the Respondents. Nor will Petitioners have a chance to recover against these Respondents under Chapter 2743 (Appendix IV), Ohio Revised Code, which waived the tort immunity of the State as of January 1, 1975. Sec. 2743.01 (A) provides that the waiver by the State does not include "political subdivisions," which are defined in Sec. 2743.01 (B) to include "Municipal Corporations, Townships, Villages, Counties and School Districts and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state . . ."

Thus, without the assistance of this Court, Petitioners, under the statutes and court decisions as they exist today, will be prevented from ever proceeding in a court of law against these Respondents. The compelling facts of this case demand that the archaic and misbegotten doctrine of sovereign immunity, which has become lodged in the statutes of Ohio and which the courts of Ohio have thus far refused to dislodge, be reviewed by this Court.

Respectfully submitted,

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